In the High Court of Judicature at Madras

Dated :- 28 .11.2007

Coram :

The Honourable Mr.Justice S.J.MUKHOPADHAYA
and
The Honourable Mr.Justice M.VENUGOPAL

W.A.No.2374 of 2000
and C.M.P.No.20543 of 2000

The Manager
The Scientific Fertiliser Company Pvt. Ltd.,
No.5 Ponnu Rangam Road
R.S.Puram,
Coimbatore 641 002. ... Appellant

Vs.

1. The Presiding Officer
Labour Court, Coimbatore.

2. P.Malayannan ... Respondents

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent against the order of the learned single Judge dated 7.11.2000 made in W.P.No.21250 of 1993 Writ of Certiorari to call the records of the Ist Respondent relating to order opassed in I.D.No. 424/89 dated 3.2.93 and quash the same and to direct the 2nd respondent to reinstate the petitioner with continuity of services with back wages.

For Appellant :- Mr.N.Balasubramanian
For Respondents:- Mr.S.Ayyathurai (R2)

JUDGMENT

M.VENUGOPAL, J.

Aggrieved against the order dated 7.11.2000 made in W.P.No. 21250 of 1993 the appellant/ management has filed the present writ appeal under Clause 15 of the Letters Patent.

2. The second respondent / writ petitioner has filed the writ petition in W.P.No. 21250 of 1993 under Article 226 of the Constitution of India and sought for the relief of quashing the award passed by the Labour Court, Coimbatore dated 3.2.1993 in and by which the second

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respondent/ writ petitioner/ employee was held to be not a workman under Section 2(s) of the I.D.Act, 1947, since the employee worked only as sales representative and that he does not have the right to raise an industrial dispute and that the appellant / management was directed to pay 10 months salary to the second respondent/ writ petitioner / employee as ex-gratia, in the circumstance, that the writ petitioner / second respondent in appeal has worked only for one year from 1.10.1986 to 30.9.1987.

3. The learned single Judge has allowed the writ petition on the ground that the second respondent / petitioner / employee comes within the ambit of definition of workman as per Section 2(s) of the I.D. Act and that the second respondent / petitioner / employee was directed to be reinstated in the same post with immediate effect with continuity of service and together with backwages and all other attendant benefits and that the said backwages and other monetary benefits should be calculated from 1.10.1987 together with interest at 12% p.a and the same should be paid in cash or D.D. Within 60 days from the date of the order. Further, it was also held that in case the post already held by the employee was not readily available, the management was directed to create a supernumerary post protecting the interest of the employee in all respects.

4. Learned counsel for the appellant contended that the learned single Judge should have noticed that it is a settled law that a person employed as a 'Sales Representative', a 'Medical Representative', a 'Salesman', a ' Sales Engineering Representative' are not held to be a 'Workman' under the I.D. Act, that Section 2(s) of the I.D.Act is not applicable to them, that the second respondent/ writ petitioner/ employee was appointed as a 'sales representative' and that he was doing the work of canvassing and also demonstrating the pesticides manufactured and marketed by the Company and that he had not done any clerical work in the appellant company.

5. It is the contention of the learned counsel for the appellant that the learned single Judge has erred in arriving at the conclusion that a 'Medical Representative' will come within the meaning of term 'workman' as defined in the Act in view of the ratio of the judgment of the Supreme Court between S.K.VERMA VS. MAHESH CHANDRA AND ANOTHER (AIR 1984 S.C. 1462 (DB) and in view of the addition of the word 'operational' in the definition and in view of the aforesaid decisions and also by means of amending Act 46/82, the learned single Judge opined that the second respondent / employee was a workman under the Act.

6. In support of his contention that the second respondent/ employee is not a workman as per section 2(s) of the I.D. Act, learned counsel for the appellant relied on the Full Bench decision of the

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Supreme Court reported in 1995 I LLJ 303 (H.R.ADYANTHAYA etc., etc., VS. SANDOZ (INDIA) LTD., etc. etc.,) wherein it is held that the word "skilled" used in the Industrial Disputes Amendment Act of 1982 would not include the kind of work done by the sales promotion employees and for the very same reason, the word "operational" would also not include the said work.

7. According to the learned counsel for the second respondent / writ petitioner, the second respondent employee is a sales promotion employee and that as per the decision of the Supreme Court in SPIC PHARMACEUTICALS DIVISION VS. AUTHORITY UNDER SECTION 48(1) OF A.P.SHOPS AND ESTABLISHMENTS ACT, 1988 AND ANOTHER (2007 (2) SCC 616), the non-employment of the second respondent/petitioner may be referred to the Forum under the I.D. Act for adjudication.

8. It is pertinent to point out that the second respondent / employee in his claim petition in I.D.No.421 of 1989 before the Labour Court, Coimbatore has averred that he was stopped from work on 1.10.1987 etc, and that there was no plea taken that the Sales Promotion Employees (Conditions of Service) Act, 1976 is applicable to him. Likewise, in the counter filed by the appellant / company before the Labour Court, there is no whisper about the applicability of the Sales Promotion Employees (Conditions of Service) Act, 1976. Suffice it to point out that the respective parties have not projected about the applicability or otherwise of the Sales Promotion Employees (Conditions of Service) Act, 1976.

9. It is not in dispute in the present case that the second respondent/ writ petitioner/ employee was originally appointed as sales trainee with effect from 5.8.1985 for a period of one year inclusive of stipend of Rs.400/-. Subsequently, the second respondent / employee/ writ petitioner was confirmed as sales representative as per letter dated 28.10.1986 of the appellant Company and that the confirmation is with effect from 1.10.1986 on a consolidated salary of Rs.500/-. It is not out of place to refer to Section 2(d) of the Sales Promotion Employees (Conditions of Service) Act, 1976, which enjoins as follows:-

> "(d) "sales promotion employee" means any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward to do any work relating to promotion of sales or business, or both, but does not include any such person --
>
> (i) who, being employed or engaged in a supervisory capacity, draws wages exceeding sixteen hundred rupees per mensem ; or

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(ii) who is employed or engaged mainly in a managerial or administrative capacity.

Explanation:-- For the purposes of this clause, the wages per mensem of a person shall be deemed to be the amount equal to thirty times his total wages (whether or not including, or compromising only of, commission) in respect of continuous period of his service falling within the period of twelve months immediately preceding the date with reference to which the calculation is to be made, divided by the number of days comprising that period of service)

10. As a matter of fact, Section 6(2) of the Sales Promotion Employees (Conditions of Service) Act, 1976, which runs as follows:-

(2) The provisions of the Industrial Disputes Act, 1947 (14 of 1947), as in force for the time being, shall apply to or in relation to workmen within the meaning of that Act and for the purposes of any proceeding under that Act in relation to an industrial dispute, a sales promotion employee shall be deemed to include a sales promotion employee who has been dismissed,discharged or retrenched in connection with, or as a consequence of that dispute or whose dismissal, discharge or retrenchment had led to that dispute.

on the enforcement of Section 24 of the Act 46 of 1982, Section 6(2) has been omitted.

11. In T.P.SRIVASTAVA VS. NATIONAL TOBACCO CO. OF INDIA LTD., (1992 1 LLJ 86) it is observed as follows:-

The duties of the appellant in the respondent company do require the imaginative and creative mind which could not be termed as either manual, skilled, unskilled or clerical in nature. His supervising work was considered incidental by the Tribunal. Such a person cannot be termed as a 'workman'

The Sales Promotion Employees (Conditions of Service) Act, 1976 is a subsequent enactment and it is not applicable to the termination in the instant

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case which was long prior to the enactment of the Act. Further no notification under this Act bringing the provisions to the employees like that of the company has been made under the provisions of the Act .

12. In GLAXO LABORATORIES (India) LTD VS. STATE OF KERALA (1992 1 LLN 822) it is held as follows:-

> "A sales /medical representative, by virtue of his nature of work will not come within the definition of "workman" as defined under the Industrial Disputes Act, 1947. The various duties performed by him in discharge of his official work do not come within any of the categories of manual, skilled, unskilled, technical, operational, clerical or supervisory work for hire or reward. If at all he does any such work it is not as part of his main work, which is promotion of sales of the employer's products. The general observations made by the Supreme Court in S.K.VERMA case (1983 II LLN 637) that the entire "labour force" excluding the "managerial force" will come within the ambit of definition "workman" is to be understood in the light of the facts of that case, and despite that the law remains the same that sales/medical representative is not a "workman" under the Industrial Disputes Act and that was why the Sales Promotion Employees' (Conditions of Service) Act, 1976 was enacted ."

13. In SG PHARMACEUTICALS, DIVISION OF AMBALAL SARABHAI ENTERPRISES LTD VS. PADAMWAR AND OTHERS (1989 II LLN 833) it is held thus:-

> "From the evidence of the witness examined in this case, it is clear that all the training, workshops and conferences were directed for achieving the objective of promoting sales or canvassing for sales. Merely because certain technical information was supplied to the medical representative that would not make his job technical but the technical information so received was to be put into use for achieving the main objective of promoting and canvassing the sales. It seems that an argument was advanced on behalf of respondent 2 in the notes of arguments which are on the record of the Labour Court, that the nature of duties which the employment of respondent 2 called for were manual because he had to carry a bag in which all the

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material required for contracting the doctors and chemists had to be carried. This would be one of the incidental functions which respondent 2 should have to perform, if he had to approach the chemists and doctors with a view to selling the products. All the information which he had to pass to them was of a technical nature so as to make the canvassing more effective and to this end it was necessary that he should be equipped with the nature of the product he had to sell. This requirement would not make his duties "technical" because it was not for the use of this technical knowledge that he was being employed, but to promote sales by applying that knowledge.

In the face of the decided decisions, it is too late now to contend that the job of sales promotion does not belong to an indentifiable category . Sub-section (2) of S.6 of the Sales Promotion Employees (Conditions of Service) Act, 1976, provides that the provisions of the Industrial Disputes Act, 1947, as in force for the time being, shall apply to, or in relation to sales promotion employees as they apply to , or in relation to workmen within the meaning of the Act and for the purposes of any proceeding under that Act in relation to an industrial dispute. From this deeming provision it is apparent that the Parliament recognised that the class for the benefit of which the legislation was being undertaken, was not covered by the definition of "workman" under S 2(s)of the Industrial Disputes Act and that was the reason to include that category by the deeming provision which was incorporated. To say, therefore, that a person who did the job of sales promotion did not belong to an identifiable category would not be correct. Another category which would not be covered by the definition of S.2(s) of the Industrial Disputes Act was the class of teachers.

The mere fact that the various duties were also required to be performed for performing the main and substantial duty of effecting sale, would not detract from what was the main duty. It cannot be said that the main duty fell into the category of technical, clerical or manual job merely because while performing that duty the employee had to be equipped with certain technical knowledge and had to do some manual or clerical work. These other functions would

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not be enough to bring him within the definition of worker. The contention of behalf of the employee that the performance of such incidental, technical, manual or clerical jobs formed as integral part of his main function and could not be incidental cannot be accepted having regard to evidence led in this case."

14. In VINESH KUMAR MEHTA VS. PRESIDING OFFICER, LABOUR COURT (1), KANPUR NAGAR AND OTEHRS (2005 (2) LLN 86), it is held that the petitioner having failed to prove that he was performing the duties of a workman and the petitioner on promotion from his post of sales representative, working as Area Manager challenged his termination before the Labour Court in the absence of proof, he cannot be held to be a workman under Section 2(s) of the I.D. Act.

15. The appellant/ company in its letter dated 26.9.1987 addressed to the second respondent/ writ petitioner/employee has informed clearly that the company does not require his services from 1.10.1987 and that the employee was advised to call on the appellant/company on 30.9.1987 for further discussion etc. In the said letter dated 26.9.1987 of the appellant company, it is clearly stated that the employee was given enough opportunity to improve his performances to generate more sales which he has to avail of.

16. By letter dated 23.12.1987 of the appellant company addressed to the second respondent/ writ petitioner/ employee it is clearly mentioned that the employee was told that his services were not required after 30.9.1987, that he accepted the same without any reservation and that he received the leave salary for 1986 and unavailed leave (1987) due to him by calling at the appellant's office and the said due amounts were paid to him in full settlement of the account and after 30.9.1987 he has not reported for duty land he ceased to be in the service of the company.

17. By letter dated 5.2.1988 addressed by the appellant company to the second respondent/ writ petitioner he was clearly informed that he ceased to be the employee of the company from 30.9.1987 and even earlier by means of letter dated 9.1.1988, addressed by the appellant/ company to the second respondent employee, he was clearly informed that no one compelled him to resign from their service or informed him that the order of termination will be sent to him and that he ceased to be an employee of the appellant / company from 30.9.1987.

18. The appellant/company is engaged in the manufacture and sales of pesticides and fertilizers and that the second respondent/ employee has to hold demonstrations. The second respondent employee was to promote the sales of the Company. Moreover, the second respondent/writ

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petitioner/employee has given voucher dated 2.11.1987 stating that he has received the amounts due to him and further that no amount is due to be paid to him by the Company. The Labour Court, Coimbatore in the award dated 3.2.1993 passed in I.D.No.421 of 1989 has come to the clear and definite conclusion that the second respondent/ petitioner has stated falsely in his evidence that he performed writing job along with the job of sales representative, which is a finding of fact.

19. After having received the money due to him, and settling his account it is not open to the second respondent/writ petitioner to plead that he was forced to resign from the company. The second respondent/ writ petitioner functioned as sales representative stationed at Palladam and Avinashi and he did not work as clerk. Merely because the second respondent/ writ petitioner/ employee has written the accounts about the orders booked by him in regard to purchase of fertilisers and pesticides by other dealers, he cannot be termed as clerk so as to bring him within the term of workman as per the I.D. Act. In reality, the second respondent/writ petitioner/employee was only a sales representative.

20. Learned counsel for the second respondent/ employee cited 2000(2) LLJ 90 between INDIAN FARMERS FERTILISERS CO-OPERATIVE LTD., NEW DELHI VS. P.O. LABOUR COURT, CHANDIGARH AND ANOTHER wherein it is held 'that the job of salesman was neither supervisory nor purely clerical that the scope of the expression 'workman' was very wide and interpretation thereof should not be to wipe out.

21. So far as the present case is concerned, we are of the opinion that the second respondent/ writ petitioner while performing the duties of sales representative in the discharge of his official duties has not come within the scope of manual, skilled, unskilled, technical, operational, clerical or supervisory work for hire or reward and if he has performed any such work, then it is not part of his main avocation as sales representative. As on date, the law remains that sales representative is not a workman under the I.D. Act and the learned single Judge by placing reliance on the decision in S.K.VERMA VS. MAHESH CHANDRA AND ANOTHER (AIR 1984 S.C. 1462 (DB) that the entire labour force irrespective of the nature and duties of the post, falls within the definition of the word 'workman' and only managerial and supervisory force to the extent excepted from the definition of the word 'workman' under Section 2(s) of the Act came to the conclusion that the second respondent/ writ petitioner/employee was though named as sales representative was utilised as a sales promotional employee only to deprive him of the benefits available under the I.D. Act.

22. The Supreme Court decision in S.K.VERMA VS. MAHESH CHANDRA AND ANOTHER (AIR 1984 S.C. 1462 (DB) relied on by the learned single Judge is held to be incuriam and the decision reported in 1995 I LLJ 303 (H.R.ADYANTHAYA etc., etc., VS. SANDOZ (INDIA) LTD., etc. etc.,) by the Constitution Bench of the Supreme Court holding that the work of the

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promotion of sales of the products or services of the establishments is distinct from and independent of the types of work covered by the definition of Section 2(s) of the I.D. Act and therefore the definition of workman under the I.D. Act will not obviously cover the Sales Promotion Employees (Conditions of Service) Act, 1976, holds the field and that the law remains that a sales representative is not a workman under the I.D. Act and this decision was not brought to the notice of the learned single Judge.

23. In the aforesaid decision in H.R.ADYANTHAYA etc., etc., VS. SANDOZ (INDIA) LTD., etc. etc., (1995 I LLJ 303) of the Constitution Bench of the Supreme Court at para 7,8 and 9 it is observed as follows:-

> 7. It is also instructive to point out, in this connection, that along with the change in the definition of "wages" , the definition of "industry" under Section 2(j) has also been amended. The relevant part of the amended definition reads as follows:-
>
> (j) "industry" means any systematic activity carried on by co-operation between an employer and his workmen (whether such workmen are employed by such employer directly or by or through any agency, including a contractor) for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes which are merely spiritual or religious in nature) whether or not
>
> (i) any capital has been invested for the purpose of carrying on such activity; or
>
> (ii) such activity is carried on with a motive to make any gain or profit and includes
> (a) any activity of the Dock Labour board established under Section 5-A of the Dock Workers (Regulation of Employment) Act, 1948 (9 of 1948);
> (b) any activity relating to the promotion of sales or business or both carried on by an establishment.
> but does not include
> xxxx xxx xxx xxxx
>
> 8. It will be seen that by the amended definition of 'industry' an activity relating to the promotion of sales or business or both, carried on by any establishment is for the first time sought to be brought

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within the said definition. However, the amended definition of "industry" has not till date come into force."

9. In the light of the amended definitions of 'workman' and 'wages', and that of 'industry' which has not yet become operative..... "

24. In SPIC PHARMACEUTICALS DIVISION VS. AUTHORITY UNDER SECTION 48 (1) OF A.P.SHOPS AND ESTABLISHMENTS ACT, 1988 AND ANOTHER (2007 (2) SCC 616) a direction was given by the Supreme Court to the State Government concerned to refer the dispute involved (which was conceded by parties to be an industrial dispute) to the Forum under the I.D. Act for adjudication.

25. In the present case on hand the main duty of the second respondent/employee was that he should demonstrate his work in canvassing the goods manufactured by the appellant/company in his capacity as sales representative to the agriculturists and also to canvass for purchase of the pesticides and chemicals manufactured by the Company . As stated already in the present case, the second respondent /employee was not terminated. But he resigned and got settled all his accounts due to him.

26. In view of our elaborate discussions and inasmuch as sales representative is not a workman under the I.D.Act and because of the fact that sub-section (2) of Section 6 of the Sales Promotion Employees (Conditions of Service) Act, 1976, relating to the application of the I.D. Act has been omitted on the enforcement of Section 24 of the Act 46 of 1982, the second respondent is not a workman as per Section 2(s) of the I.D. Act, 1947and in that view of the matter, while allowing the writ appeal we set aside the order of the learned single Judge dated 7.11.2000 passed in the writ petition in W.P.No. 21250 of 1993 and we do hereby affirm the award passed by the Labour Court, Coimbatore in I.D.No. 421 of 1989 dated 3.2.1993. The sum of Rs.5,000/- as ordered to be paid by the Management to the second respondent employee by the Labour Court, Coimbatore as exgratia if not paid by the appellant/company , the appellant / company is directed to pay the same to the second respondent within a period of two weeks from the date of receipt of copy of this order to prevent aberration of justice and to promote substantial cause of justice. Considering the facts and circumstances of the case, there shall be no orders as to costs. Consequently, the connected C.M.P is closed. No costs.

krr/

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Asst. Registrar

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Sub Asst.Registrar

To

1.The Presiding Officer
Labour Court, Coimbatore.
+ One cc to Mr. S. Ayyathurai, Advocate sR 70287
+ One cc to Mr. N. Balasubramanian, Advocae sR 70241
KM (co)
sg 05/12/07

order in
W.A.No.2374 of 2000
Dated :- 28.11.2007

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